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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-141

In the Matter of the Application of HARRY GREENSEID, GEORGE PAPALEXIS, AUSTIN B. COX, SAM WEISS, ERNEST GUGGENHEIM, JOHN R. MURPHY, BENJAMIN WALLACK, ELMER HAUCK, JOHN LEONIDAS, ARTHUR RUSSELL, WILLIAM DONOVAN and MURRAY SOLOMON, individually and as Trustees of Local 11 Welfare Trust Fund,

Petitioners,

v.

RICHARD E. STEWART, Superintendent of Insurance of the State of New York,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 298 N.Y.S. 2d 607, 31 A.D. 2d 454. The opinion of the Court of Appeals modifying the order of the Appel-

late Division and confirming the determination of the State Superintendent of Insurance in all respects is reported at 284 N.E. 2d 152, 30 N.Y. 2d 730. The order of the Court of Appeals denying the petitioners' motion to amend the remittitur is not yet reported. They are reproduced at pp. 50a-56a, 62a-66a, and 67a-68a of the appendix to the petition for certiorari.

Jurisdiction

Petitioners invoke this Court's jurisdiction pursuant to 28 USC 1257(2).

Questions Presented

1. Was the determination of the New York Superintendent of Insurance that petitioners, trustees of an employee welfare fund, were responsible for the depletion of the assets of that fund resulting from repeated enormous overpayments for eye-glasses for fund members and dependents, consistent with due process of law?

The Court of Appeals held that it was.

2. Is New York Insurance Law § 37-e, which provides that reports of examinations and investigations are "admissible in evidence and shall be presumptive evidence of the facts therein" in administrative proceedings against trustees of employee welfare funds, constitutional as applied to petitioners?

The Court of Appeals held that it was.

3. Did petitioners properly preserve their objections under the Fourteenth Amendment by asserting them in the state courts?

This issue was not explicitly decided by the state courts.

Constitutional and Statutory Provisions

The pertinent provisions of the Constitution (Sixth and Fourteenth Amendments) and statutes (N. Y. Ins. Law §§ 24-1, 37-e and 37-l) are set forth in the petition at pp. 3-6.

Statement of the Case

This petition seeks further review of a determination of the Superintendent of Insurance which was unanimously confirmed in all respects by the New York Court of Appeals.

Petitioners are trustees of the Local No. 11 Welfare Trust Fund (herein "Fund"), an employee welfare fund established by a local of the Chain Service Restaurant, Luncheonette and Soda Fountain Employees' Union and its employers. Employee welfare funds are subject to the supervision and control of the New York Superintendent of Insurance pursuant to the strict regulatory scheme of Insurance Law Article 3-A (§§ 37 *et seq.*). As such trustees, petitioners were explicitly made "responsible in a fiduciary capacity for all money, property, or other assets received, managed or disbursed by them, or under their authority, on behalf of such fund" (§ 37-l[1]).

In 1963 the Superintendent of Insurance, pursuant to § 37-d, directed an examination of the Fund and a report of the Department's examiners' findings. This examination resulted in a thorough report, published by authority of an order of the Superintendent dated December 14, 1966. This report, once published by the Superintendent, is "admissible in evidence and shall be presumptive evidence of the facts stated therein" in any proceeding against the trustees of the Fund. Insurance Law § 37-e(2).

The report noted that in 1956 the Fund's contract for optical services, including one pair of eye-glasses annually

per member, cost 17 cents per member per month. Since the Fund has about 4,800 members this amounted to approximately $9,800 per year. In 1960 the Fund contracted with an optometrist, one Zucker, providing for glasses for dependents as well as members, and raising the cost to 50 cents per member per month or approximately $28,800 per year. And in 1962 yet another contract was made with Zucker, this one for a $33,000 annual retainer.

The report of the examiner found that although the trustees had thus spent over $154,000 on optical services for members for the period January 1957 through May 1964, they "did not make a significant effort to ascertain whether equivalent value was received" and had entered into both the original contract and the enormous increases "arbitrarily" and "without cost studies, comparisons with other plans or requests for bids from competitor optical plans."

The report further documented the trustees' failure to maintain a list of Fund members applying for optical care (even though issuing cards to all members and dependents requesting optical services) and their refusal to authorize examination of Zucker's records pertaining to Fund members.

Moreover, the report showed, the trustees actually concealed from their membership the fact that the contracts with Zucker since 1960 provided for free glasses for dependents, so that not only were members "misinformed concerning the availability of a valuable benefit to their families," but "[t]he fund itself suffered financial loss because it was paying Dr. Zucker [on an annual retainer] for a benefit of which the members were not aware." Further investigation revealed that between 1960 and 1965 petitioners had paid $180,780 to Zucker for 4,492 visits, or an average cost of $40.24 per pair of glasses, assuming each visit resulted in a pair of glasses.

The Department's analysis of figures submitted by 55 other welfare funds for the substantially similar optical

services showed that the average cost of glasses was $6.19. Thus, assuming each visit resulted in issuance of a pair of glasses, their real value (at $6.19 per pair), and the resulting depletion of the assets of the Fund (amount paid less real value), would be (30a):

Year	Amount Paid	Value at $6.19 pr.	Depletion
1960	$ 21,165	$ 4,872*	$16,293*
61	29,305	4,444	24,861
62	31,310	4,228	27,082
63	33,000	4,042	28,958
64	33,000	5,453	27,547
65	33,000	4,766	28,234
Total	$180,780	$27,805	$152,975

But, in the utter absence of records by the trustees showing the actual utilization of Zucker's services, the Department gave the trustees the benefit of the postulate that a pair of glasses was issued, not for each visit, but for each authorization card issued by the Fund—and many more cards were issued than visits occurred. Even using this approach, the depth of the depletion of the Fund's assets was still enormous (31a):

Year	Number of Cards issued	Amount Paid	Cost per pr. glasses	Value at $6.19 pr.	Depletion
1960	1,233	$ 21,165	$17.16	$ 7,632*	$13,533*
61	1,092	29,305	26.91	6,759	22,546
62	1,292	31,310	24.23	7,997	23,313
63	1,207	33,000	27.34	7,471	25,529
64	1,114	33,000	29.62	6,896	26,104
65	952	33,000	34.70	5,893	27,107
Total	6,890	$180,780		$42,649	$138,131

* Rounded to nearest dollar.

Disclosure of this squandering of the Fund's assets—over $138,000 in a 6-year period—led to service of a citation charging petitioners as trustees of the Fund with contributing to this depletion, and directing them to appear at a departmental hearing to determine whether they should be removed, charged with such depletion, or fined, pursuant to the responsibilities of the Superintendent under § 37-l.

At the hearing, held before a Deputy Superintendent of insurance, petitioners were represented by counsel throughout. Evidence was adduced that no competitive bids were sought by the trustees at any time and that the trustees made no attempt to determine how many Fund members or dependents used Zucker's services until 1964, long after the examination was in progress. Even more shocking, the trustees kept no records whatever of how many members the Fund referred to Zucker. Petitioners even refused to authorize Insurance Department examiners to inspect Zucker's records.

The Department examiner who prepared the supplemental report testified as to the calculation by the Department's analysts of the average price of $6.19 from the statistics in the 55 reports and the extrapolation of these figures to demonstrate the extent of petitioners' wasting of the Fund's assets. The most extensive cross-examination of this witness, Zaroff, failed to alter his testimony in any meaningful way.

In introducing the 55 reports, the Hearing Officer explicitly affirmed petitioners' "right to subpoena any witnesses under the broad right of subpoena power in connection with these documents as well as any documents such as the contracts used as a basis for those reports." The Department's trial counsel stipulated to "make * * * available" any Department employee they wished to have testify. No such subpoena or testimony was ever requested by petitioners.

Two of the petitioners testified, in effect disclaiming any wrongdoing, but utterly failing to explain or justify the continuous dissipation of the Fund's assets through the guise of the increasingly expensive optical care contracts. Petitioner Solomon's testimony disclosed the trustees' failure to make utilization studies or to take any steps to find out whether the Fund's monies were being spent intelligently until seven months after being directed to do so by the Department. And the Fund's office manager stated petitioners did not know whether every member who was issued a card received glasses, or even whether a majority did so, and that petitioners simply did not know how many eligibles received glasses or even how many visited the optometrist.

The findings and decision adopted by the Superintendent (1a-32a) summarize the factual and legal background in detail, and refer specifically to the purposes of New York's statutory scheme for the supervision of employee welfare funds "to the extent necessary to protect the rights of employees and their families" (Ins. Law § 37; 4a), and to prevent "the exploitation of welfare funds, by unscrupulous individuals" (4a). The Hearing Officer found petitioners depleted the assets of the Fund by paying "excessive and exorbitant sums of money to Zucker for his services and that they failed * * * to keep adequate records relating to the utilization of Zucker's services by fund eligibles," and further by failing to exercise their right to cancel the contracts (14a). Petitioner Solomon was found to have doubly breached his fiduciary obligations both as trustee and as administrator of the Fund (15a).

Petitioners as trustees were accordingly held responsible for the waste and "liable for the funds unreasonably spent if due to any wrongful or negligent act or omission on their part" (17a). The Superintendent calculated the depletion to total $138,131 (as explained at p. 5, *supra*), giving petitioners the benefit of the doubt as to the amount

of glasses purchased by assuming that each card issued by the Fund represented the dispensing of a pair of glasses (21a), even though petitioners' own office manager had testified that they had no idea how many of those who were issued cards ever actually received glasses.

Petitioners were accordingly found responsible for the depletion of the Fund's assets (24a-25a). Petitioner Solomon was removed as trustee and administrator and fined $2,500 pursuant to § 37-l(5) (26a).

The Appellate Division unanimously sustained the determination except as to the portion relative to the computation of the amount of the depletion resulting from petitioners' breach of trust. The Court held it was "established by ample evidence that the trustees did not fulfill their duties of supervision, of maintenance of adequate records, and of conservation of the assets of the Welfare Fund" (52a), adding (*id.*):

> "The paucity of records and the failure of the trustees and their employees to make adequate explanation of their conduct led inevitably to the findings and conclusions stated by the hearing officer (see White v. Rankin, 18 A.D. 293, aff'd 162 N.Y. 622)."

The Appellate Division rejected all petitioners' challenges to the determination save one. It held that "[s]tandards of due process are found to have been adhered to" (52a), except as to the computation of the amount of the depletion assessed against the trustees. As to that figure, the Court agreed with the Superintendent that "[t]he policy of secretiveness pursued by the establishment controlling the welfare fund necessitated employment of expedients to determine the factor of what the cost should have been" (53a). It upheld as competent and, under § 37-e(2), "presumptive evidence," the reports of the 55 similar welfare funds introduced at the

hearing (53a). But it set aside so much of the determination as found the amount of the depletion to be $138,131 (55a):

> "[W]hile the hearing officer's basic findings, conclusions and decision may stand, there is no acceptable proof as to the proper calculation of the amount of depletion, and those findings and conclusions relating thereto should be stricken, without prejudice to the right of the attorney general to establish the amount of the same by proper proof in any action he may bring against the trustees to recover depletion (sec. 37-1[6] Ins. L.)"

As so modified, the determination was confirmed.

The Court of Appeals unanimously modified that order and reinstated the determination of the Superintendent in all respects. It held (65a):

> "Taking the record as a whole, we find substantial competent evidence to support the entire determination made by the Superintendent and conclude that the trustees have failed to demonstrate that the administrative proceedings were tainted by any irregularities or a denial of procedural due process."

Thereafter petitioners moved to amend the remittitur to reflect that the Court of Appeals passed on contentions that the determination violated rights under the Sixth and Fourteenth Amendments. In fact, as noted in the Superintendent's opposing papers, no due process claim under the Fourteenth Amendment was asserted in the pleadings, and it was scarcely referred to even in petitioners' Court of Appeals briefs. (See the petition [46a-47a], referring to due process rights "under Article 1, Section 6 of the New York State Constitution.") The Court of Appeals denied petitioners' motion (67a-68a).

Reasons for Denying Certiorari

None of the contentions advanced by petitioners raise any substantial issue under the United States Constitution. Indeed, their due process claims were expressly limited in their pleadings to asserted denials under the New York State Constitution (46a-47a). No reference whatever to due process under the Fourteenth Amendment was made, and even in the Court of Appeals petitioners heavily relied on the State provision while making but two cursory references to the United States Constitution.

But whether or not the Federal due process claim was properly asserted, it is insubstantial. Petitioners' objections to the determination of the Superintendent, unanimously rejected by the Court of Appeals, amounted to claims that the particular determination was not supported by substantial evidence and rested to some extent on hearsay. These sort of objections to administrative determinations in the economic sphere, where no issue under the First Amendment or the Equal Protection Clause is involved, have been repeatedly held not to raise substantial questions of due process. See *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229, 230; *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 690 (9th Cir. 1949), cert. den. 338 U.S. 860 (a case strangely relied on by petitioners); *NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 351 ("The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights."); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 143 F. 2d 488 (8th Cir. 1944), aff'd 324 U.S. 635. In a wide variety of contexts the factual determinations of both federal and state agencies in the economic sphere have been sustained and their broad discretion noted. *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 207; *Murphy* v. *Finch*, 427 F. 2d 338 (6th Cir. 1970); *Great Lakes Airlines, Inc.* v. *C.A.B.*, 294 F. 2d 217 (D.C. Cir. 1961), cert. den. 366 U.S. 965, reh. den. 368 U.S. 872.

The objections that the statutory provision that at the administrative hearing the Department may introduce the reports of its examiners and accountants as "presumptive evidence of the facts stated therein" (Ins. Law § 37-e[2]) violates both due process and the right of confrontation under the Sixth Amendment are likewise insubstantial. The statutory presumption is rebuttable and there was never any suggestion otherwise. See *Matter of Stewart (Citizens Casualty Co.)*, 23 N.Y. 2d 407, 415, 244 N.E. 2d 690 (1968); 27 N.Y. 2d 685, 262 N.E. 2d 215 (1970), cert. den. 401 U.S. 910. The states are free to prescribe the burden of proof and of persuasion before their own administrative tribunals. *Speiser* v. *Randall*, 357 U.S. 513, reh. den. 358 U.S. 860. It is basic that administrative agencies have authority to choose the criteria determinative of an issue of fact and may, in the exercise of their discretion, reject evidence which lacks materiality in view of those criteria. *Panhandle Eastern Pipe Line Co.* v. *Fed. Power Comm'n, supra*, 143 F 2d 488.

The record here overwhelmingly showed the most flagrant disregard of the high level of conduct expected of fiduciaries. *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 62 ALR 1 (1928); *Himoff Industries Corp.* v. *Srybnik*, 19 N.Y. 2d 273, 279, 225 N.E. 2d 756 (1967). This welfare fund was, as we have noted, a trust fund held for the benefit of the members and their dependents. Ins. Law § 37-l.

It was shown beyond plausible dispute that petitioners entered into agreements for optical care so improvident—to say the least—that profligate waste of the assets of the Fund members directly resulted. The cost of glasses paid by the members here ranged from 3 to 5½ times the average amount paid by 55 similar welfare funds (21a). In 1965 the Fund expended $34.70 per pair of glasses, assuming a pair was dispensed for every card issued, the assumption, extremely favorable to petitioners, made by the Hearing Officer and adopted by the Superintendent.

That such conduct breached petitioners' fiduciary responsibility to the members of the Fund and their dependents is self-evident, and the courts properly so held. 3 Scott, TRUSTS (3rd Ed.) § 187.2. Moreover, the flat failure of these trustees to make utilization studies, or take any steps whatever to ascertain whether the Fund was getting its money's worth from its increasingly prodigal optical costs, was itself a serious breach of their fiduciary duties.

The Legislature, mindful of the need to guard the assets of employee welfare funds from dissipation through negligence or guile, vested in the Superintendent the most extensive powers of examination, supervision, and enforcement. See *McKay* v. *Stewart,* 29 N.Y. 2d 563, 272 N.E. 2d 887 (1971), cert. den. sub nom. *Cecire* v. *Stewart,* 31 L.ed. 2d 581 (April 3, 1972); *People* v. *Automobile Transporters Welfare Fund,* 17 A.D. 2d 448, 235 N.Y.S. 2d 702 (1st Dept. 1962), aff'd 13 N.Y. 2d 814, 192 N.E. 2d 222, cert. den. 376 U.S. 908. Supervision "to protect the rights of employees and their families" (§ 37) was specifically declared by the Legislature to be "the policy of the state." The Superintendent prescribes the information to be furnished by trustees upon their registration with the Insurance Department (§ 37-b) and may examine the affairs of a fund whenever he sees fit (§ 37-c). Examiners authorized by the Superintendent are to have access to all books and records of the fund and power to examine trustees, fund employees and others under oath (§ 37-d). See *People* v. *Automobile Transporters Welfare Fund, supra.*

Petitioners were afforded every procedural safeguard at the hearing. The reports of the 55 funds, which petitioners contend to have denied their rights to confrontation and due process, were introduced subject to their right to subpoena any witnesses or documents they desired in order to dispute the statistical method of proof employed

by the Department. Petitioners never exercised their right, specifically provided by statute (Ins. Law § 24-l) and by the Hearing Officer, to subpoena material to challenge the sufficiency of the showing that the funds were comparable. This neglect to make the slightest attempt to controvert the Department's showing renders their claim untenable. See *Richardson* v. *Perales,* 402 U.S. 389, 404; *Willapoint Oysters, Inc.* v. *Ewing, supra,* 174 F.2d 676, 692; *Francois* v. *Bushell,* 325 F. Supp. 531, 533-534 (N.D. Cal. 1971). It was incumbent on petitioners, in this administrative proceeding of a civil nature, to rebut the presumed accuracy (see Ins. Law § 37-e[2]) of the reports introduced. Even if there were no such statutory presumption, the record shows that they failed to request the very material or witnesses which they now claim to have been "unconstitutionally" denied them. Although they initially objected to the introduction of the 55 reports, their neglect to even request a subpoena of other reports—after being repeatedly offered the right to examine Department witnesses on this subject even without subpoena—is tantamount to a waiver of the objection.

The necessity of the statistical method employed by the Department was acknowledged by the New York courts in view of what the Appellate Division aptly characterized as petitioners' "policy of secretiveness" (53a). This method was, in addition to being entitled to the presumption of correctness "of the facts stated therein" established by § 37-e(2), a plainly proper means of demonstrating the extent of the flagrant waste of Fund assets. In comparable situations administrative agencies' inferences based, as here, on statistical proof have been sustained where the inferences of wrong-doing were not rebutted and flowed plausibly from the facts. See *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 590. It has been consistently held that presumptions created by statute are fully permissible so long as, as here, a rational

connection exists between the facts shown and those presumed. *Turner* v. *United States,* 396 U.S. 398, 408-416; *South Carolina* v. *Katzenbach,* 383 U.S. 301, 323, 329-333; *United States* v. *Johnson,* 433 F. 2d 1160 (D.C. Cir. 1970). This is especially true in civil proceedings and where, as is the case here, the presumption is rebuttable—although even conclusive presumptions have been sustained where the requisite rational connection exists. *Cancel* v. *Wyman,* 321 F. Supp. 528, 531 (S.D.N.Y. 1970), app. dism. 441 F. 2d 553; *Jensen* v. *United States,* 326 F. 2d 891 (9th Cir. 1964). The proof employed by the Department's examiners was more than sufficient to reveal the magnitude of this parasitic attack on the Fund by its own trustees, in brazen defiance of their responsibility "in a fiduciary capacity for all money, property or other assets received, managed or disbursed by them" (§ 37-1[1]), and in the utter absence of any explanation. The presumed validity of the sampling was "enhanced by the silence" of petitioners. *NLRB* v. *Ohio Calcium Co.,* 133 F. 2d 721, 727 (6th Cir. 1943).

Contrary to challenge by petitioners (Pet. pp. 16-18), in this administrative proceeding by a regulatory agency a presumption such as § 37-e(2) imposes is fully consonant with due process. Petitioners served in a fiduciary capacity and had a strict duty, both at common-law and under the Insurance Law, to maintain adequate records, keep track of trust funds committed to them for safekeeping, and protect their beneficiaries against the squandering of trust assets which the Insurance Department's investigation revealed. The statutory presumption of correctness of the Department's reports on examination, prepared by its professional staff of experienced civil servants, is a valid exercise of the State's power in this area traditionally subject to stringent supervision. Petitioners' broadside completely fails to rebut the powerful presumption of the statute's constitutionality. *Ferguson* v. *Skrupa,* 372 U.S. 726.

The statistical sampling method of detecting irregularity in adminstrative proceedings has been consistently sustained so long as, as here, adequate opportunity to cross-examine or introduce rebuttal evidence is present. It has been upheld even in criminal prosecutions. See *Holland* v. *U.S.*, 348 U.S. 121, sustaining the use of the net worth method of determining tax evasion. See also *Matter of Stewart (Citizens Casualty Co.), supra,* p. 11. It is the function of the administrative tribunal to resolve conflicting inferences and evaluate the probative value of evidence adduced before it and no constitutional issue is raised by objection to the substantiality of the evidence in a particular case, absent utter arbitrariness—plainly not the case on this record.

Petitioners' remaining arguments are insubstantial. The assertion (Pet. p. 11) that "[o]f the fifty-five reports only five dealt with Optometrists like Dr. Zucker rather than with Opticians" is a meaningless statement since each of the 55 funds was contracting for the furnishing of eyeglasses and under New York Law eyeglasses may be dispensed only on the prescription of a physician or optometrist. Education Law § 7126. Further, if petitioners wished to challenge the comparability of the 55 funds employed in the sampling, their remedy was to subpoena the contracts or examine the Department personnel who prepared the sampling.

It is disingenuous for petitioners to allege that "necessary witnesses were not produced for cross examination despite demand therefor" (Pet. p. 14) when in fact the most thorough and extensive cross-examination of Department examiners took place and petitioners were free to subpoena any witness they saw fit. In any event petitioners had no constitutionally-protected right to have the Department call any particular witness against them. *Cooper* v. *California,* 386 U.S. 58, reh. den. 386 U.S. 988;

People v. *Ruiz,* 39 Cal. Rptr. 641, 643, 228 Cal. App. 2d 703 (1964).

The administrative proceedings against petitioners were purely civil and in no way "quasi-criminal" (Pet. p. 17). They were instituted pursuant to the Insurance Department's statutory responsibilities to protect the members of the employee welfare fund and their dependents.

The cases cited by petitioners are distinguishable and do not advance their position. *United States* v. *Romano,* 382 U.S. 136, dealt with a statutory presumption in a criminal case which was without basis in fact—that mere presence at an unlawful still presumed the defendant's possession, custody or control of the still. Here, the rebuttable presumption is not of guilt—indeed, the proceedings are civil, not criminal—but only of the accuracy of the facts contained in the report prepared by the Department's examining staff.

Powhatan Mining Co. v. *Ickes,* 118 F. 2d 105 (6th Cir. 1951), relied on by petitioners, is inapposite here. There the denial by the Department of the Interior of the petitioners' applications was based on a list of prices charged by undisclosed competitors. The Department refused to divulge the names and rejected the petitioners' demand to show that the price variations "might be due to matters which concerned the shipper and the consumer" (118 F. 2d at 108). Here, on the other hand, the names of the 55 funds appear on their reports and there were no extraneous elements as in *Powhatan* which could affect the computations since the optical services supplied were identical. In addition, the petitioners in *Powhatan* would have had to subpoena competing companies which were parties antagonistic to them in that very proceeding—another factor not present here. Moreover, there was lacking in *Powhatan* the presumption of correctness of the facts contained in the reports established by § 37-e(2). The other case em-

phasized by petitioners, *Matter of Erdman* v. *Ingraham* (Pet. pp. 21-23), a state case, concerned a determination based only on hearsay, and with no opportunity to cross-examine, in contrast to the case at bar.

Although petitioners contend their right of cross-examination was curtailed, the fact is they were allowed the most lengthy and thorough cross-examination of the Department's witnesses. And they had the right to subpoena any other witness, in their behalf—a right which they failed to exercise. Their claims of denial of due process and confrontation are utterly insubstantial, and New York's highest court properly so held.

CONCLUSION

For the foregoing reasons the instant petition for a writ of certiorari should be denied in all respects.

Dated: New York, New York, September 5, 1972.

Respectfully submitted,

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